Office of Administrative Hearings

TO: Chief Lorraine Lee
FROM: Sabiha Ahmad, Staff Attorney; Johnette Sullivan, Deputy Chief (data author)
SUBJECT: Executive Summary of Suitable Representation at OAH—January 1, 2018, to December 31, 2021
DATE: August 15, 2022

It has been four years since we began appointing "suitable representatives" (hereafter "SRs") for certain parties with disabilities. Deputy Chief Administrative Law Judge (ALJ) Johnette Sullivan serves as our ADA Coordinator, and she has gathered data on our SR appointment process from January 2018 to December 2021. This short executive memo provides the following:

A. A summary of two prior reports and various data provided by Deputy Chief Sullivan.
B. A brief chronicle of successes and failures.
C. Proposals for improvement.

A. Four Years of Suitable Representation: Data Summary

The six metrics to assess the SR process broke down as follows (listed in WAC 10-24-010(22)):

a) Timeliness: Over four years, it took an average of 41 days to approve and 48 days to deny an SR request/referral. The average time between an SR approval and SR appointment has not been derived from the data. In 2021, it took us an average of 64 days to approve and 51 days to deny an SR request/referral. The response range varied from same day to 313 days. In 2020 it took us an average of 65 days to approve and 48 days to deny an SR request/referral. The range was same day to 195 days.

b) Hearing outcome for parties with an SR: 9 settlements, 3 reversals of agency action, and 4 affirmations of agency action. There were no defaults issued for any of the 16 parties represented by an SR.

c) Number of SR requests approved and denied: Over four years, 16 approved (and accepted by the parties) and 172 denied. Of the denials, most people were approved for alternative accommodations (98), some withdrew their ADA modification request (34), some were determined by our ADA Coordinator not to be disabled (21), some were unable to consent or were not a party (8), and some were eligible for an SR but we were unable to find one (11).

d) Number of SR denials appealed to Chief (a.k.a. grievances): 19 total. In almost all grievances, our ADA Coordinator's decision was upheld by the chief; however, in one case the chief ALJ added an alternative accommodation when we were unable to find a qualified SR to meet the party's needs.
e) Feedback: No one surveyed (including parties, ALJs, department representatives, and OAH staff) advised us to stop providing an SR accommodation when necessary for meaningful participation. We did not regularly or consistently solicit feedback in our data gathering process over the last two years.
f) Fiscal: The four-year total SR costs were $2,700.

B. Successes and Failures

We have struggled to build a consistent pool of advocates across the state to serve in this innovative role, which has also been difficult to fund and insure with liability coverage. Partly due to these factors, we were unable to provide an SR to 11 of 26 SR-eligible parties, i.e., roughly 42%. If we are evaluating our implementation of the SR process by this metric, we have failed so far.

If measured by the training framework and the number of other accommodations successfully provided, the rule implementation has seen some success. WAC 10-24-010 led us to collect data on a significant number of alternative ADA accommodations, e.g., large font and scheduling modifications. Of 172 SR denials over the four years, Deputy Chief Sullivan approved 98 alternative accommodations. Our staff have also developed thorough SR training material for the public website, although the material is lengthy and underutilized.

C. Proposals for Improvement

The framework is in place for success, but foundational issues persist. Our failure to establish a reliable pool of SRs is one such foundational concern. In practice, we have only used SRs who are attorneys. We have not yet tapped into the potential of other qualified SR candidates, even though the rule allows it. Our upcoming rulemaking activities are a crucial opportunity to solicit as many ideas from the public on these subjects as possible.

To bolster our framework, we should address redundancy in the written articulation of our accommodation process. There is the WAC, policies and procedures, and separate training materials on top of everything else—the materials are too lengthy for volunteers to engage with. Furthermore, the language from these materials does not consistently relate back to the ADA and Department of Justice (DOJ) language/mandate: the materials currently reference "minimum necessary accommodations" which is an arguably lesser standard than the DOJ regulations. "Minimum necessary" is also potentially off-putting language to parties and sets a poor customer service tone for our staff. The DOJ regulations stemming from the ADA provide clearer language:

> A public entity shall make **reasonable modifications** in policies, practices, or procedures when the modifications are **necessary** to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would **fundamentally alter** the nature of the service, program, or activity.

28 CFR § 35.130(b)(7)(i) (2021) (emphasis added).

Standardizing the language would benefit external and internal stakeholders. If the WAC is written more plainly, then extensive explanatory material becomes less necessary.

Data compilation is another area for continued improvement. The current rule requires us to develop "routine reports that reflect the number of requests for accommodation pursuant to [WAC 10-24-010], the result of those requests, and the costs, if any, associated with any such accommodation." WAC 10-24-010(21). Data gathering is necessary for controlling quality and meeting our strategic goal of performance excellence. The following can be improved:

- First, to assess "timeliness", a new data column should indicate the dates we respond to an ADA modification request/referral, e.g., the date of a denial letter or approval notification.
- Second, our IT department could streamline our methods for gathering data, e.g., by consolidating multiple entries for the same party across different case numbers.
- Third, if IT cannot automate the process, then assessing "case outcomes" could be manually routinized. The manual process requires staff to periodically check individual case files in PRISM to see when matters have been resolved. This could be done monthly or quarterly.
- Last, we could present quick, optional, and anonymous surveys at the end of hearings asking parties to rate their experience with the accommodation process and make suggestions. This would allow us to identify and target weaker areas of service (e.g., if we are consistently getting low ratings for accommodating visual versus auditory disabilities).

There is always room to innovate and expand the alternative modifications, although a fiscal analysis may be necessary to determine what would be a "fundamental alteration" of our capacity. Currently, WAC 10-24-010 focuses almost exclusively on SR accommodations. This is a small part of our process for accommodating people with disabilities. Instead of presenting SR accommodation as a standalone rule, it could be more accurately contextualized as the "reasonable modification" of last resort within a range of different accommodations. The accommodation rule could be expanded to clearly state a non-exhaustive list of the various modifications that we have offered to people with disabilities (e.g., large font or sign language interpretation). Besides achieving our mission of greater clarity, this would alleviate our ADA coordinator's concerns about parties mistakenly requesting SRs solely because they feel entitled to representation—rather this broader articulation would make it clear that SRs are only an option for people with disabilities. Adding "disability" or "accommodations for people with disabilities" to the chapter title would also significantly clarify what this rule is about.

The four years of data have been critical in demonstrating our attempts to meet the goals of the initial SR rulemaking petition. At this juncture, we are in a relatively informed position to reconvene with the public and renew our commitment to the ADA's baseline of equal access for people with disabilities.

--End of report--